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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1799

CALVIN JOSEPH LAWSON, JR.,
Petitioner

v.

D. P. EDWARDS, JR.,
and
A. E. SLAYTON, JR.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

JOHN C. LOWE
F. GUTHRIE GORDON, III
Lowe and Gordon, Ltd.
1111 West Main Street
Charlottesville, Virginia 22903

Attorneys for Petitioner

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No. .....

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v.

D. P. EDWARDS, JR.,
and
A. E. SLAYTON, JR.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Virginia entered on March 4, 1974, affirming an order dismissing a Petition for Writ of Habeas Corpus entered by the Circuit Court for the County of Rockingham, Virginia entered on August 12, 1972.

Opinion Below

On March 4, 1974, the Supreme Court of Virginia announced that it was of the opinion that there was no reversible error in the judgment of the Circuit Court for the County of Rockingham, thus rejecting the Petition for Appeal and refusing a Writ of Error in this case; the effect of which was to affirm the judgment of the Circuit Court for Rockingham County. The order of the Supreme Court of Virginia and the Circuit Court for Rockingham County are included in the Appendix, *infra*.

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on March 4, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

1. Whether it was error to rule rule that Petitioner, a male, had no standing to raise the issue of systematic exclusion of women from his trial jury, particularly when he was charged with rape and raised the defense of consent, in violation of the Constitution of Virginia and the Sixth and Fourteenth Amendmenst to the Constitution of the United States?

2. Whether the failure to record an incident of trial and the failure to instruct the trial jury as to the punishment for one of the charged offenses constitutes highly prejudicial error and a denial of Due Process and Equal Protection under the Fourteenth Amendment to the Constitution of the United States thus entitling Petitioner to a new trial?

Statement of the Case

On July 24, 1970, Petitioner, a male, was tried by a jury selected from the master jury list for Rockingham County, Virginia upon the felony charges of rape and abduction with intent to defile. At that time, under VA. CODE. ANN. §§ 8-178 and 182 (Cum. Supp. 1970), any housewife, notified by the jury commissioners that she had been chosen for the master jury list, could advise the commissioners that she did not wish to serve and her name would be removed from the master jury list. Further, the list was chosen by jury commissioners having taken an oath that persons selected from the master jury list be

believed by the Commissioners to be of good repute for intelligence and honesty. VA. CODE ANN. §8-181 (Cum. Supp. 1971). As a result, the master jury list for Rockingham County contained only 23 women out of 307 persons and from this disproportionate array there were 22 jurors of the venire summoned and present, three of whom were women. From the venire summoned, the actual panel of twelve was chosen and *none* of these persons were women; all were men.

For unknown reasons the recording of the July 24, 1970 trial did not begin until after the indictments had been read, the plea entered, and the jury selected. There was no evidence that a charge to the jury or the indictment itself was read to the jury at the beginning of the trial; and no evidence that the penalty limits to be imposed upon conviction were specified for the rape charge. If a charge was read, it was read prior to the recording device being turned on.

When the jury was given its instructions by the court at the conclusion of the evidence, they were instructed as to the range of punishment for abduction with intent to defile, but not as to the range of punishment for rape. Lawson was found guilty of the felonies of abduction with intent to defile, for which he received a penitentiary sentence of six years, and rape, for which he received a penitentiary sentence of ten years.

Lawson filed a Petition for Writ of Habeas Corpus in 1972 in the Circuit Court of Rockingham County, Virginia alleging the above stated facts and praying to be released or retried. At a hearing held on July 10, 1972, George W. Kemper, Circuit Court Clerk for Rockingham County, and Jack F. DePoy, Commonwealth Attorney for Rockingham County, testified that they had no conscious recollection of the charges having been read at the beginning of the trial, although the reading of the charge at the beginning of a trial was the practice of the Circuit Court of Rockingham

County at that time. However, even if a charge of some sort had been read, per custom, they could not state whether a charge for rape had been read during the trial of Calvin Lawson, giving punishment limits, or merely an abduction charge, or both. Lawson's Petition for a Writ of Habeas Corpus was denied by the Circuit Court for Rockingham County.

On March 4, 1974, referring to *Quick v. Harris*, 214 Va. 632, 202 S.E.2d 869(1974) decided the same day, the SupremeCourt of Virginia found there was no reversible error in the judgment of the Circuit Court for Rockingham County, rejected Lawson's Petition for Appeal and refused to award a Writ of Error. By that opinion, the Virginia Supreme Court affirmed the judgment of the Rockingham County Circuit Court.

A Petition for Writ of Certiorari is filed this day requesting review in *Quick v. Harris*, 214 Va. 632, 202 S.E.2d 869(1974) as well.

REASONS FOR GRANTING THE WRIT

1. Petitioner had standing to raise the issue of sex discrimination in the selection of his trial jury.

The Court below ruled that, as a male, Lawson had no standing to raise the issue of systematic exclusion of women from his jury. Petitioner contends that the law is plainly in support of his challenge to the exclusion of women from his jury; thus the lower courts erred in denying him standing.

The error of the lower courts is particularly egregious in that Petitioner Lawson faced charges of the sex-related crimes of rape and abduction with intent to defile and that he depended upon a defense of consent. The distinctive

medly of views influenced by differences in biology, cultural impact and life experience of women was an indispensable ingredient for a fair and just fact-finding in the Petitioner's case. *Healy v. Edwards*, 363 F. Supp, 1110 (E.D.La. 1973). The systematic exclusion of women can not be justified on the grounds of saving them a distasteful or embarrassing experience, *Abbott v. Mines*, 411 F. 2d 353 (6th Cir. 1969), nor on any other; their exclusion was constitutionally impermissible.

Central to Petitioner's argument is the case of *Duncan v. Louisiana*, 391 U.S. 145(1968), holding that a trial by jury in serious criminal cases is fundamental to the American scheme of justice, and that the Fourteenth Amendment extends to the citizens of the states the Sixth Amendment guarantee of trial by jury. When the Sixth Amendment was extended in its application to the citizens of the states in *Duncan*, it brought with it the full force of this Court's past Sixth Amendment interpretations. *Johnson v. Louisiana*, 406 U.S. 385(1973). These past decisions serve to interpret and clarify the minimum requirements below which no constitutionally permissible jury may fall.

It is Lawson's position that his jury was constitutionally defective in that women had been systematically excluded from participation. A brief review of the holdings of pertinent decisions by this Court supports Plaintiff's contention.

In a successful challenge to the exclusion of women from jury service, this Court held that not only the systematic and intentional exclusion of a racial group, *Smith v. Texas*, 311 U.S. 128(1940), or an economic class, *Thiel v. Southern Pacific*, 388 U.S. 217(1946), but also of one of the sexes, deprives the jury system of the broad base it was designed to have in our democratic society. *Ballard v. United States*, 329 U.S. 187, 195(1946).

Despite the Court's reliance on its supervisory powers

of the federal courts and the resulting absence of a constitutional footing, there can be no doubt about the essential quality attributed by the holding in *Ballard* to women's participation in jury processes. At page 194 of the *Ballard* opinion, the Court suggests that participation by women may be even more important than that of a racial group or economic or social class. ". . . a distinct quality is lost if either sex is excluded. Exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

See also the line of cases beginning with *Fernandez v. Texas*, 347 U.S. 475, 477, 478(1954); *Brown v. Allen*, 344 U.S. 443, 474(1953); *In Re: Murchison*, 349 U.S. 133, 136(1955); *Labat v. Bennett*, 365 F.2d. 398, *cert. denied* 386 U.S. 991(1967); *Witherspoon v. Illinois*, 391 U.S. 510, 519(1968); *Carter v. Jury Commissioners*, 396 U.S. 320, 322, 333(1970).

But out of these affirmations by the Supreme Court as to the impermissibility of systematic exclusion of racial groups, economic classes, or a sex grew questions of standing. Who had standing to challenge the exclusion of a black person, a working person, or a woman? Must the Petitioner be a member of the excluded group in order to complain and seek redress in the Courts?

Ballard v. United States, *supra*, settled that women have a right to be tried under a jury system free from discrimination against women, and it has been long settled that the Equal Protection Clause of the Fourteenth Amendment protects blacks from being tried by juries chosen by discriminatory selection procedures against blacks. *Strauder v. West Virginia*, 100 U.S. 303(1880); See also *White v. Crook*, 251 F. Supp. 41(M.D. Ala. 1966). But it had been widely held by state and federal courts that a white defendant did not have standing to raise procedural defects that related to jury discrimination against blacks.

See *The Defendant's Challenge to a Racial Criterion in Jury Selections A Study in Standing, Due Process, and Equal Protection*, 74 YALE L. J. 919(1965); *Peters v. Kiff*, 407 U.S. 493, n4(1972). And further it had been argued by many and upheld in some courts that the Equal Protection Clause of the Fourteenth Amendment protected against racial discrimination but not discrimination based on sex. *Goessaert v. Cleary*, 353 U.S. 464(1949); *Miskumas v. Union Carbide Corp.*, 399 F.2d. 847(7th Cir. 1968).

Then in June of 1972 this Court ruled that a white state court defendant had an absolute right to trial by a jury selected without racial discrimination against blacks. *Peters v. Kiff*, 407 U.S. 493(1972). The lead opinion of three justices also plainly implies that any criminal defendant would have standing to object to the sysytematic exclusion of women from his jury:

> Thus, if the Sixth Amendment were applicable here, and Petitioner were challenging a post-*Duncan* petit jury, he would clearly have standing to challenge the systematic exclusion of any identifiable group from jury service.

Peters v. Kiff, supra.

This language buttressed by the Supreme Court decision in *Reed v. Reed*, 404 U.S. 71(1971) making it clear that the Equal Protection Clause extends protection to women from discrimination based on sex leads to the inescapable conclusion that a male has standing to raise female exclusion from the jury process. See also: *Frontiero v. Richardson*, 411 U.S. 677(1973), and *Cleveland Board of Education v. LaFleur*, 94 S.Ct. 791(1974)

This Court has recently decided the case of *Kahn v. Shevin*, 42 U.S.L.W. 4591 (April 24, 1974) ruling that

a Florida statute giving widows, but not widowers a $500 property tax exemption does not unconstitutionally discriminate against widowers on the basis of sex. This holding is distinguished from *Reed*, *Frontiero* and *Cleveland Board of Education*, *supra*, in that Florida was not denying substantive and procedural benefits to one sex and not the other. Further, the challenged Florida statute in *Kahn* is a state tax law. The Court has long recognized that the States have large leeway in making classifications and drawing lines which in their judgement produce reasonable systems of taxation.

However, the question has been raised to as wether or not *Peters v. Kiff* should be accorded retroactive effect so as to extend coverage to convictions taking place before its decision date as is true in the instant case.

Retroactivity

Peters v. Kiff plainly falls within that category of cases which should be given retroactive application. This Court has fashioned a rule stating that in cases "where the major purpose of new constitution doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." *Williams v. United States*, 401 U.S. 646, 653 (1971); *Adams v. Illinois*, 405 U.S. 278, 280(1972). Nothing is more essential to the reliability of the fact-finding or truth-determining process, than a properly selected jury.

In other opinions dealing with retroactivity, the approach mandated by *Linkletter v. Walker*, 381 U.S. 618(1965) has come to be summarized in terms of a three-fold analysis directed at discovery of:

1. the purpose to be served by the new standard,

2. the extent of reliance by law enforcement authorities on old standards, and

3. the effect on administration of justice of retroactive application of the new standards.

Stovall v. Denno, 388 U.S. 293, 297(1967), *Desist v. United States*, 394 U.S. 244, 249(1969). By either the test of *Williams v. United States*, 401 U.S. 646(1971) or *Stovall v. Denno*, 388 U.S. 293, 297(1967), *Peters v. Kiff* is appropriate for retroactive application.

Among the rules that have been held to be appropriate for retroactive application are

Gideon v. Wainwright, 372 U.S. 335(1963) (right to counsel), held retroactive in *Doughty v. Maxwell*, 376 U.S. 202(1964);

Bruton v. United States, 391 U.S. 123(1968)(right to confront and cross examine witnesses), held retroactive in *Roberts v. Russell*, 392 U.S. 293(1968);

Douglas v. California, 372 U.S. 353(1963)(right to counsel on appeal), held retroactive in *Smith v. Crouse*, 378 U.S. 584(1964);

Mempa v. Rhay, 389 U.S. 128(1970) (right to counsel at sentencing) held retroactive in *McConnell v. Rhay*, 392 U.S. 2(1968);

White v. Maryland, 373 U.S. 59(1963) (right to counsel at preliminary hearing in which substantial rights may be adversely affected), held retroactive in *Arsenault v. Massachusetts*, 393 U.S. 5(1968).

The right to a jury selected without systematic exclusion on the basis of sex in the instant case rises to at least the level of importance as the above-mentioned rights.

A Case of First Impression

Although the *Peters v. Kiff* decision involved a three, three split among the six majority justices, the plurality lead opinion in *Peters* provides the basis for the result Petitioner seeks here. This Court is facing squarely for the first time the question of whether a male Defendant in a rape case may challenge the systematic exclusion of women from his or her jury. This case also presents the larger question of whether any Defendant may challenge the systematic exclusion of any identifiable group from his or her jury.

Petitioner contends that the state cannot subject him to a jury that is plainly illegal and give him no recourse. Just as this court had never before considered a white defendant's challenge to systematic exclusion of blacks from his jury prior to *Peters v. Kiff*, so too, this Court has never before considered a male's challenge to the systematic exclusion of women from his jury in a rape case prior to the instant case. In this first case the Court should grant Petitioner a writ, reverse the decision of the Virginia Supreme Court and announce the rule that a man has standing to challenge the systematic exclusion of women from his jury.

Two important and emerging doctrines meet in this case. The first of course is the non-member standing rule of *Peters*, *supra*. The other is the growing recognition of sex discrimination as forbidden by the Fourteenth Amendment. *Reed v. Reed*, 404 U.S. 71(1971); *Frontiero v. Richardson*, 411 U.S. 677(1973); *Cleveland Board of Education v. LaFleur*, 94 S.Ct. 791(1974). Here, curiously enough a male suffers the sex discrimination complained of. Were the Petitioner a woman, the Commonwealth of Virginia would not dispute that Petitioner would have standing to raise the issue of jury selection which is the subject of this attack. Because Petitioner is a male, he was not permitted by the Virginia courts to raise the

issue. There is no valid reason for the distinction, especially when, as here, in a sex related crime, the presence of women on the jury is essential to a fair trial.

Granted Standing, Petitioner Should Prevail on the Merits

Once it is conceded by the retroactive application and construction of *Peters v. Kiff* or by the announcement of a new rule from this case of first impression that Lawson is entitled to raise the sex discriminattion question, we must turn our attention to the merits of the claim. On the merits, the case is plainly made. Even at the beginning, when a "tentative selection" for the master jury list was made, only 33% of the jurors on the prospective list were women. Over 50% of the population in the jurisdiction were women at this time. Thus, even at the very first step in the jury selection process, there was a disparity of 17%. See *Stephens v. Cox*, 449 F.2d 657 (4th Cir. 1971).

After the women notified returned their refusals as permitted by Virginia statute, only 23 women remained on the list of 307 persons. This is less than 8% women of the total jury list.

From the total jury list, a venire was chosen. There were twenty-two persons from the venire present on the day of Petitioner's trial; three of whom were women. The actual panel of twelve jurors was chosen from the venire and not one of the jurors was a woman. This is plainly a showing of discrimination. The Commonwealth bears the burden of refuting it and having failed to do so, the Petitioner is entitled to relief. *Stephens v. Cox*, *supra.*

2. Failure to record an incident of the trial and failure to instruct the jury as to the range of punishment for a charged offense are highly prejudicial errors.

VA. CODE ANN. §17-30.1 (Cum. Supp. 1970), spells out clearly the requirement that the incidents of trial and the evidence must be *recorded*. It is undisputed that the reading of the charge and the range of penalty to the jury are incidents of trial. *Id.* Thus the trial court failed to meet its obligation under Virginia statute and the inability of the Court to be able to provide a full transcript entitles the defendant to a new trial. This was settled in *Cabiness v. Commonwealth*, 203 Va. 330, 143 S.E.2d 911(1965), which in turn relied upon this Court's decision in *Griffin v. Illinois*, 351 U.S. 12(1956).

Certainly the failure to record the reading of any charge to the jury was doubly important in the instant case because the trial court also failed to instruct the jury as to the range of punishment for rape before the jury's deliberations. In Virginia, and unlike the federal system, the jury is responsible for fixing the sentence of a convicted defendant. VA. CODE ANN. §19.1-291, (Cum. Supp. 1970).

At the conclusion of the presentation of the evidence in Petitioner's trial, Judge Haas instructed the jury on the penalties for abduction with intent to defile and a lesser included offense of abduction, but he failed to instruct the jury on the penalty for rape. There is no evidence that the jurors were ever told such matters at the beginning of the trial; as far as the record shows, they were never instructed as to the permissible range of penalties for rape.

In *Richards v. Commonwalth*, 161 Va. 1073, 171 S.E. 525(1933), the Virginia Supreme Court dealt with a set of jury instructions that included penalties which failed to conform to the charge. The Court reversed the conviction, fearing that the jury could have been misled by the instructions which did not clearly set forth the range of penalties in the case at bar. The court so ruled, even though the verdict rendered did fall within the permissible range. It was the possibility of misleading the jury that led to a reversal.

Here this situation is very much the same. As far as

the record shows, the jury did not know what the permissible range of punishment was and could very well have been motivated by an erroneous belief that the minimum sentence for rape was ten years.

Because in the federal system the jury does not bear the responsibility for sentencing, there is no direct authority on which to rely. The most ready analogy is the failure of the federal trial judge to instruct the jury as to the nature and elements of a charged offense or the statutes and regulations defining and governing an offense. Circuit Judge Maris has written:

> We think it is self-evident that a jury can not perform its duty of determining the guilt or innocence of a defendant accused of a crime unless they know the essential elements of the crime which he is alleged to have committed. We think it equally self-evident that the only appropriate source of that knowledge is the trial judge. . . . It was because of the failure of the trial judge to give this necessary guidance to the jury that we recently reversed the judgment of conviction in *United States v. Levy*, 153 F.2d 995(3d Cir. 1946).

United States v. Noble, 155 F.2d 315, 317(3d Cir. 1946). See also *Carson v. United States*, 147 F.2d 437(9th Cir. 1944) and *Screws v. United States*, 325 U.S. 91(1945). Such errors have been considered so fundamental and plainly prejudicial as to merit review even in the absence of an assignment of error. *Screws v. United States*, *supra*, at page 107; *Morris v. United States*, 156 F.2d 525, 527 (9th Cir. 1946).

In the instant case, the failure to record an incident of trial and the failure of the trial judge to instruct the jury as to the permissible range of punishment for a charged offense is fundamental and highly prejudicial. This is a denial of Due Process and Equal Protection under the Fourteenth Amendment and Petitioner is entitled to a new trial.

CONCLUSION

For the reasons set forth above, this Petition for Certiorari should be granted.

Respectfully submitted

JOHN C. LOWE
Lowe and Gordon, Ltd.
1111 West Main Street
Charlottesville, Virginia 22903

F. GUTHRIE GORDON, III
Lowe and Gordon, Ltd.
1111 West Main Street
Charlottesville, Virginia 22903

Attorneys for Petitioner

June 2, 1974

MAILING CERTIFICATE

I hereby certify that on or before the 2nd day of June, 1974, I mailed three true copies of the foregoing Petition for Writ of Certiorari to The Honorable Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia, and three copies to Robert E. Shepherd, Jr., Esquire, Assistant Attorney General, Life of Virginia Building, Richmond, Virginia.

/s/John C. Lowe
JOHN C. LOWE
Attorney for Petitioner

APPENDIX

APPENDIX

Order of the Supreme Court of Virginia denying Petition for Writ of Error dated March 4, 1974

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON MONDAY, THE 4TH DAY OF MARCH, 1974.

The petition of Calvin Joseph Lawson for a writ of error to a judgment rendered by the Circuit Court of Rockingham County on the 7th day of August, 1972, in a certain proceeding then therein pending, wherein Calvin Joseph Lawson was the petitioner and D. P. Edwards, Superintendent of the Bureau of Correctional Field Units and another were respondents, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said court. See *Quick* v. *Harris, Sheriff, etc., et al.*, 214 Va. ——, this day decided.

A Copy,

Teste:

/s/ H. G. Turner
Clerk

Opinion and Order of the Circuit Court of Rockingham County dated August 7, 1972.

VIRGINIA:

In the Circuit Court of Rockingham County

CALVIN JOSEPH LAWSON

Petitioner

v.

D. P. EDWARDS, Superintendent
Bureau of Correctional Field Units

and

A. E. SLAYTON, JR., Superintendent
Virginia State Penitentiary

Respondents

OPINION AND ORDER

This proceeding came on to be heard on July 10, 1972, upon the petition and amendments thereto of Calvin Joseph Lawson for a writ of habeas corpus and the answers of the respondents, the petitioner appearing in person and by John C. Lowe, Esquire, counsel of his own choosing, and the respondents appearing by Robert E. Shepherd, Jr., Assistant Attorney General. Whereupon the Court heard the evidence and arguments of counsel and upon reviewing the record and transcript of the proceedings in this Court on May 5 and 6, 1970, which are hereby made a part hereof, and, for the reasons stated from the bench during the course of and at the conclusion of that hearing, the

Court is of the opinion that the writ should not issue as prayed.

It is, therefore, ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and it is hereby, denied and dismissed, the writ discharged, and the petitioner remanded to the custody of the respondents, to all of which action of the Court, the petitioner, by counsel, objects and excepts.

Let the Clerk of this Court certify a copy of this order to the petitioner, the respondents, counsel for the petitioner, and to Robert E. Shepherd, Jr., Assistant Attorney General of Virginia.

Enter this 7th day of August, 1972

/s/ Joshua L. Robinson
Judge

I ask for this:

/s/ Robert E. Shepherd, Jr.
Counsel for Respondent

Seen and objected to:

/s/ John C. Lowe
Counsel for Petitioner